

March 22 2006

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Honorable John W. Whelan
District Judge, Department No. II
Butte-Silver Bow County Courthouse
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Butte, Montana 59701
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FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

AMERICAN CAPITAL GROUP, LLC,

Plaintiff,

vs.

FLATHEAD ELECTRIC COOPERATIVE,
INC.,

Defendant.

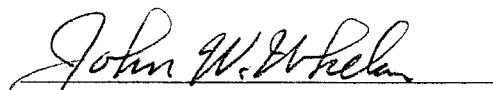
Cause No. DV-03-451(C)

**ORDER DENYING DEFENDANT'S
MOTION TO DISQUALIFY JUDGE
STADLER**

This matter arrives before the Court on referral from the Montana Supreme Court pursuant to § 3-1-805, MCA. On December 16, 2005, Defendant, Flathead Electric Cooperative, Inc. ("FEC"), moved to disqualify Judge Stewart E. Stadler for cause in the above-captioned matter. Both parties submitted briefs and waived oral argument. This Court having jurisdiction over the parties and the subject matter, and having reviewed the case file and briefs,

IT IS HEREBY ORDERED that Defendant FEC's Motion to Disqualify Judge Stadler is **DENIED**, that each party is responsible for its own attorney fees and costs, and that this matter is remanded to the Eleventh Judicial District for further proceedings before Judge Stadler.

DATED this 21 day of March 2006.


John W. Whelan
District Judge

MEMORANDUM

To remove a judge for cause, a party must "file an affidavit alleging facts showing [the judge's] personal bias or prejudice . . ." Section 3-1-805, MCA.

The Affidavit submitted in support of FEC's Motion alleges: "Judge Stadler's findings in his November 22, 2005 Order acknowledge a personal bias or prejudice." Affidavit of Shelton C. Williams at ¶ 3. Judge Stadler's Order and Rationale on Motion to Change Venue reveals no such acknowledgment. Acknowledging the majority rule applicable to jurors who are members of a cooperative is certainly not the same as Judge Stadler acknowledging he is personally biased or prejudiced.

The Court rejects FEC's argument that the same *per se* rule of disqualification for potential jurors who are members of a cooperative should be applied to members of the judiciary.

The rules that apply to the disqualification of potential jurors are different than judicial disqualification laws. While it is the majority rule in the United States that a member of an electric cooperative is *per se* incompetent to sit as a juror in an action to which the cooperative is a party (see Annotation, *Competency of Juror as Affected By His Membership In Co-Operative Association Interested in the Case*, 69 A.L.R.3d 1296), there is no corollary rule applicable to judges. Rather, judges are distinguishable in that they take an oath to be impartial, and what a judge considers and evaluates as far as evidence is usually far greater than what a juror hears at trial.

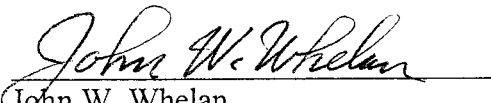
Further more, FEC's Motion to Disqualify Judge Stadler is facially deficient as it does not allege facts showing Judge Stadler's personal bias or prejudice, as is required by § 3-1-805, MCA. Rather, FEC's Motion is based primarily on Judge Stadler's rulings in the case, which may be addressed on appeal. Nothing in the record indicates that Judge Stadler is prejudiced or biased against either party in this case. Judge Stadler has done nothing to create an appearance of impropriety.

The fact that Flathead Judges live and work in the Flathead and, like almost everyone else who lives and works in the Flathead, receive their electricity from Defendant, does not support a finding that each judge - or Judge Stadler in particular - is personally biased or prejudiced. Even if Defendant made its motion pursuant to § 3-1-803, MCA, rather than § 3-1-805, MCA, grounds justifying disqualification are not present. The requisite showing requires substantially more than demonstrating that a local judge obtains electricity from the only source of power in a community. If the opposite were true, judges would routinely be disqualified in matters involving the public as a whole.

Finally, FEC has long-since waived its ability to disqualify Judge Stadler, especially when one considers FEC has not moved to disqualify Judge Stadler and the other Flathead Judges in other cases involving FEC. An objection to a judge can be waived either expressly or impliedly. At a minimum, FEC has impliedly waived any ability to disqualify Flathead Judges given the many cases it has had before them in the past.

Wherefore, the Court determines and concludes that no reasonable cause exists for disqualification of Judge Stadler, and remands this matter to the Eleventh Judicial District for further proceedings before Judge Stadler.

DATED this 21 day of March 2006.


John W. Whelan
District Judge